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In the Supreme Court of the United States

October Term, 1974

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and **MARVIN OBRY, ROBERT KOHLS and GENE RIEDL,** individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

Interest Of The Amicus Curiae 2

Issue Presented for Review 3

Statement Of The Case 3

Summary Of Argument 3

Argument 5

Introduction 5

I. The Hortonville School Board Has Not Been Shown To Be A Presumptively Biased Tribunal And The Wisconsin Supreme Court Erred In Holding That The Board Is Constitutionally Disqualified From Adjudicating Issues Of Staff Misconduct 8

A. There Was No Probability Of Bias In The Hortonville School Board's Dual Role As Collective Bargaining Agent And Adjudicator Of The Issues Before It 8

B. A School Board's Putative Institutional Bias Against Striking Does Not Constitute Disqualifying Bias 17

II. Absent Circumstances Necessitating A Presumption of Bias, The School Board Should Not Be Disqualified From Adjudicating Matters Of Hiring, Firing And Staff Discipline Without Clear Evidence Of Actual Bias 18

III. The Proceedings Before The School Board Demonstrated That The Board Was Not Biased 25

Conclusion 27

TABLE OF AUTHORITIES

Cases

PAGE

Arnett v. Kennedy, 416 U.S. 134 (1974) 7, 19, 21, 22

Board of Regents v. Roth, 408 U.S. 564 (1972) 6, 19

Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961) 18

Cato v. Collins, 394 F.Supp. 629 (E.D.Ark. 1975) 19

Connell v. Higginbotham, 403 U.S. 207 (1971) 27

Couper v. Madison Board of Police and Fire Comm'rs, 369 F.Supp. 721 (W.D.Wis. 1974) 20

Dugan v. Ohio, 277 U.S. 61 (1928) 14, 15

Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973) 14, 16, 23

Duncan v. Louisiana, 391 U.S. 145 (1968) 18

FTC v. Cement Institute, 333 U.S. 683 (1948) 18, 19

Gibson v. Berryhill, 411 U.S. 564 (1973) 21, 27

Goss v. Lopez, 419 U.S. 565 (1975) 27

Hortonville Education Ass'n v. Hortonville Joint School District No. 1, 66 Wis.2d 469, 225 N.W.2d 658, *cert. granted,* 44 U.S.L.W. 3180 (U.S. Oct. 6, 1975) 6, 11, 12, 25, 26

Kaprelian v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975) 24

King v. Caesar Rodney School District, 380 F.Supp. 1112 (D.Del. 1974) 14

PAGE

Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975) 16, 18

Morrissey v. Brewer, 408 U.S. 471 (1972) 14

In re Murchison, 349 U.S. 133 (1955) 14

Perry v. Sindermann, 408 U.S. 593 (1972) 6, 27

Pickering v. Board of Education, 391 U.S. 563 (1968) .. 14

Richardson v. Perales, 402 U.S. 389 (1971) 16

Robison v. Wichita Falls & North Texas Community Action Corp., 507 F.2d 245 (5th Cir. 1975) 20

Shaw v. Board of Trustees, 396 F.Supp. 872 (D.Md. 1975) 17

Simard v. Board of Education, 473 F.2d 988 (2d Cir. 1973) 23, 24

Taylor v. Hayes, 418 U.S. 488 (1974) 13, 14

Tumey v. Ohio, 273 U.S. 510 (1927) 13

Ungar v. Sarafite, 376 U.S. 575 (1964) 27

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 13, 14, 15

Withrow v. Larkin, 421 U.S. 35 (1975) 8, 12, 13, 14, 15, 27, 28

Wolff v. McDonnell, 418 U.S. 539 (1974) 27

Wood v. Strickland, 420 U.S. 308 (1975) 5, 22

Other Authorities

2 K. C. Davis, *Administrative Law Treatise* (1958) 19

Education Commission of the States, *A Legislator's Guide To Collective Bargaining In Education* (1975) 8

J. Mecklenberger, *Women on School Boards* (1974) 5

National School Boards Association, Unpublished Study (1975) 5

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Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-fifth year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. National School Boards Association submits this brief in the belief that the decision of the Supreme Court of Wisconsin, in an attempt to follow the commands of the due process clause of the Federal Constitution, threatens the ability of the nation's school boards to govern effectively the schools entrusted to their care and erodes in significant measure the concept of local lay control of public schools.

The parties have consented in writing to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Whether the elected members of a public school board, who have the exclusive authority under State law to discharge teachers engaged in an illegal strike, are prohibited by the due process clause of the Federal Constitution from doing so because they are not sufficiently impartial decisionmakers.

STATEMENT OF THE CASE

Amicus curiae relies on the statement of the case set forth in the brief for petitioners.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Wisconsin in this case rests on a presumption of bias. It presumes bias from a school board's exercise of multiple responsibilities with respect to supervision of its teaching staff. The circumstances to which the Wisconsin Court adverted do not, under the standards heretofore articulated by this Court, render the board a biased decisionmaker in the constitutional sense. Nor do they justify taking from the board its important decisionmaking power with respect to staff misconduct.

That the board might have a policy orientation or "institutional bias" against striking is not enough to require the board's disqualification for bias.

The extent to which an adjudicator must be removed and isolated from the issues and parties before him to satisfy due process depends on the nature of the government function involved and a balancing of the interests at stake.

When the government is acting in the role of an employer, both the government and the public have a vital interest in the concerned and effective supervision of employees by those in supervisory roles. In the context of

public school administration, the recruitment and maintenance of an effective and committed teaching staff is among the most important functions school boards serve, and their ability to serve it should be carefully preserved. Bias should not be presumed from the fact of a relationship between the parties. A teacher challenging a school board's ability fairly to adjudicate matters respecting his employment should be required to adduce evidence of actual bias—a manifest inability on the board's part to listen to and evaluate the evidence—before he can disqualify the board from making important decisions affecting the conduct of the schools. The record in the case at bar, far from indicating bias, demonstrates that the Hortonville School Board was capable of acting fairly and did act fairly.

The vitality of local lay control of schools by the community's representatives will not survive if discretion to make lawful decisions and authority to act upon them is stripped from local school boards. The ability of school boards to meet effectively their responsibility to provide a good education for the schoolchildren of their communities depends on their ability to formulate policy, to make judgments on how to deal with the problems that confront them and to take swift and effective action. Their responsibility and concern for the schools, and their awareness of and authority in all aspects of school administration, are their major strength and should not be grounds for disqualification for bias. Because the Hortonville School Board was not shown to be a biased tribunal, it should not have been held disqualified from adjudicating the issues before it.[1]

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[1] Amicus does not address the issue whether, under the facts of this case, liberty or property interests were implicated in the teachers' discharge, but assumes for purposes of argument that the school board was required to afford termination procedures complying with due process.

ARGUMENT

Introduction

This case presents a question of enormous importance to the survival of local lay control of public schools: whether local school boards will be able to maintain their traditional authority and discretion in matters of teacher discipline and discharge.

The Hortonville School Board is typical of school boards across the nation. Like over 90% of the nation's school board members, its members are chosen by popular election.[2] It is the state governmental body charged with responsibility for the proper and effective governance of the public school system on the local level. The employment and maintenance of a qualified teaching staff is one of its most critical functions. To that end, it is required by state law to negotiate the terms of employment contracts with teacher representatives and to enter into contracts with teachers; it has exclusive authority under state law to hire and fire teachers.

The Hortonville teachers, in contravention of state law prohibiting strikes by public employees, went on strike and closed the schools. The school board, following notice and hearing, decided to discharge the striking teachers and hire a new teaching staff. The Supreme Court of Wiscon-

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[2] A study conducted in 1974 found that 93.4% of the nation's school board members are elected to their positions. *See* J. Mecklenberger, *Women on School Boards* 30 (1974). An unpublished National School Boards Association study conducted in January, 1975, and based on a stratified random sample concluded that 94.2% of school board members are elected. *Cf., Wood* v. *Strickland,* 420 U.S. 308, 320 n.11 (1975).

sin held below that despite the state's express and exclusive grant of power to the school board to make teacher discharge decisions, and despite the fact that striking, as a matter of law, constituted cause for discharge, the board was constitutionally disabled from deciding to discharge because it was not an impartial decisionmaker. The Court held further that even if all facts necessary to establish cause for discharge were admitted by the teachers, the board could not, consistent with due process, determine whether they should be discharged or not. It based its decision on the board's participation in collective bargaining negotiations which preceded the strike, observing that the school board members were "not uninvolved in the events which precipitated decisions they were required to make." *Hortonville Education Ass'n* v. *Hortonville Joint School District No. 1,* 66 Wis.2d 469, 494, 225 N.W.2d 658, 671 (1975) [hereinafter cited as *Hortonville Education Ass'n*].

In *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), this Court held that when liberty or property interests are implicated in a public school teacher's discharge, termination procedures must comply with due process. The Wisconsin Supreme Court holds that the due process requirement of a fair hearing disqualifies individuals involved in the circumstances leading to the decision to discharge from making that decision; it applies its holding to a case in which the decisionmakers' "involvement" was simply their participation in collective bargaining negotiations, required of them as school board members by state law. Where *Roth* and *Sindermann* require the government employer to give the employee notice and an opportunity to be heard, the Wisconsin Supreme Court's decision removes the employer's authority to listen and decide. Due process does not require this result.

The Wisconsin Court in the instant case adverted to no factual circumstances which would support a finding of bias under standards heretofore articulated by this Court. Rather, it assumed the school board's bias against the entire teaching staff because of bargaining table conflicts between the board and teacher representatives. It pointed to no evidence of animosity between the board and teachers, no pecuniary interest in discharge on the part of the board members and no directly or necessarily inconsistent functions entrusted to the board.

In presuming bias, the Wisconsin Court pointed to the school board's involvement in related functions it has traditionally exercised in its conduct as an employer of teachers. The Court's decision, if upheld, will significantly alter the nature of government employment since employer "involvement" in the events preceding a decision to discharge occurs, in varying forms and degrees, in virtually every discharge for cause situation. *See Arnett* v. *Kennedy,* 416 U.S. 134, 170 n.5 (1974) (concurring opinion of Mr. Justice Powell).

Public school boards, with the enormous responsibility entrusted to them for the operation and direction of their local schools, must retain the power to make judgments respecting staff misconduct; of all their functions, this one perhaps most significantly affects the quality of a school system. While this case does not present an issue of federal court intervention in state educational affairs, it presents what is more troubling: a state court finding that, absent any evidence of actual bias on a school board's part, the power to discharge, expressly vested in the elected school board by state law, must be taken from it to conform to the federal due process guarantee. Such a significant measure of democratic self-government should not be sacrificed without evidence that it is necessary to do so.

I.

THE HORTONVILLE SCHOOL BOARD HAS NOT BEEN SHOWN TO BE A PRESUMPTIVELY BIASED TRIBUNAL AND THE WISCONSIN SUPREME COURT ERRED IN HOLDING THAT THE BOARD IS CONSTITUTIONALLY DISQUALIFIED FROM ADJUDICATING ISSUES OF STAFF MISCONDUCT.

A. There Was No Probability Of Bias In The Hortonville School Board's Dual Role As Collective Bargaining Agent And Adjudicator Of The Issues Before It.

The decision of the Supreme Court of Wisconsin in this case rests on a presumption of bias from a school board's exercise of its traditional functions in the area of staff supervision. There was no evidence of record indicating that bias actually existed. Amicus respectfully submits that under the standards previously articulated by this Court, the circumstances to which the Wisconsin Court adverted do not present such a probability of actual bias to justify rending from the school board its authority to make an important decision affecting the conduct of its local schools. See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

The Hortonville School Board, like most school boards across the nation, is vested by state law with substantial responsibility for the conduct of the local schools. Its responsibilities extend to all aspects of staffing including teacher recruitment, hiring, contract negotiations (it is required by Wisconsin law to bargain collectively with teacher representatives) and staff discipline.[3] It has ex-

[3] At least thirty-four states require or permit collective bargaining or meet and confer procedures. *See* Education Commission of the States, *A Legislator's Guide to Collective Bargaining in Education* 6-35 (1975).

clusive authority under state law to hire and discharge teachers.[4] Its primary duty, however, is to provide public

[4] Wis. Stat. Sec. 118.22(2) (1973). In forty-five states, the local school boards have power to hire and fire teachers. Ala. Code tit. 52, §§86, 165, 187; Alaska Stat. §§ 14.20.130, 14.20.140, 14.20.170; Ariz. Stat. Ann. §§ 15-443(A), 15-545(A), 15-252, 15-253, 15-262, 15-263 [see *Johnson* v. *Board of Ed.*, 101 Ariz. 268, 419 P. 2d 52 (1966)]; Ark Stat. tit. 80, §§ 1236, 1245, 509; Colo. Rev. Stat. §§ 22-32-109(f), 22-32-110(h); Conn. Gen. Stat. Ann. §10-220; Del. Code Ann. tit. 14, §§ 1049, 1420; Fla. Stat. Ann. tit. 15, §230.23(5); Ga. Code Ann. §§ 32-607, 32-912; Idaho Code §33-513; Ill.Rev.Stat. ch. 122, §§10-20.7, 10-22.4, 24-1; Burns Ind.Stat. Ann. 20-5-2-2(7); Ia. Code Ann. §§279.12, 279.24; Kan. Rev.Stat. Ann. §§72-5401 to 72-5412; La. Rev.Stat. §17.81; Me. Rev. Stat. Ann. tit. 20, §§161(5), 473(4); Mass. Gen. Laws Ann. ch. 71, §§38, 42; Mich. Comp. Laws Ann. §340.569; Minn. Stat. Ann. §123.14; Vern. Mo. Stat. Ann. §§168.102 to 168.120; Mont. Rev. Code §75-5933; Neb. Rev. Stat. §79-441, 79-1249, 79-1254, 79-1254.01, 79-1254.02, 79-1256, 79-1259, 79-1260; Nev. Rev.Stat. §§391.100, 391.120; N.H. Rev.Stat. Ann. ch. 189, §1339; N.J. Stat. Ann. §§18A: 27-1, 18A: 27-4; N.M. Stat. Ann. §77-4-2; N.Y. Educ. Law §§1604(8), 1709, 1804, 1903, 1952 (McKinney); N.C. Gen. Stat. §§115-72, 115-142; N.D. Century Code §15-29-08; Ohio Rev. Code §§3319.07, 3319.08, 3319.16; Okla. Stat. Ann. tit. 70, §§5-117, 6-103; Ore. Rev. Stat. §332.505; Purdon's Pa. Stat. Ann. tit. 24, §§ 5-514, 11-1106; R.I. Gen. Laws §§16-2-18, 16-12-6; S.C. Code §21-230; S.D. Comp. Laws §§13-8-39, 13-43-15; Tenn. Code Ann. §49-214; Vern. Tex. Educ. Code Ann. §§22.08, 22.09; Utah Code Ann. §§53-4-14, 53-51-4; Vt. Stat. Ann. tit. 16, §§1751, 7152; Va. Code §22-203; Wash. Rev. Code Ann. §28A.58.100; W. Va. Code §§18A-2-1, 18A-2-8; Wis. Stat. §§118.21, 118.22; Wyo. Stat. §21.1-27. Although each local school board in Kentucky and Maryland is empowered to dismiss teachers, its hiring power is subject to the superintendent's approval. Ky. Rev. Stat. §160.290, 160.380; Md. Code Ann. art. 77 §§61, 62, 114. In Mississippi, the school superintendent has discharge power on the local level. Miss. Code Ann. §§37-9-17, 37-9-59. In Hawaii, hiring and firing is done by the state board of education. Hawaii Rev. Laws §296-15. California permits teachers to appeal preliminary board termination decisions to a review body. West Cal. Educ. Code Ann. §§ 12902, 13055, 13252, 13403, 13413.

school education for the community's schoolchildren; to fulfill that duty, it must keep the schools open for 180 days a year to qualify for essential state financial aid.[5]

[5] Wis. Stat. Sec. 121.17 (1973). A minimum number of school days is prescribed by statute or administrative regulation in forty-nine states. Ala. Code tit. 52, §209; Alaska Stat. §14.03.030; Ariz. Rev. Stat. Ann. §15-442(A)(1); Ark. Stats. §80-1503; West Cal. Educ. Code Ann. §17551; Colo. Rev. Stat. §22-50-103; Conn. Gen. Stat. Ann. §10-15; Del. Code Ann. tit. 14, §1023; Fla. Stat. Ann. tit. 15, §236.02(2); Ga. Code Ann. §32-605; Idaho Code §33-512 (1); Ill.Rev.Stat. ch. 122, §10-19; Burns Ind. Stat. Ann. §20-10-2-1; Ia. Code Ann. §279.10; Kan. Rev.Stat. Ann. §70-7032; Ky. Rev. Stat. §157.530; La.Rev.Stat. §17:222; Me. Rev. Stat. Ann. tit. 20, §855; Md. Code Ann. art. 77, §73; Mass. Bd. of Educ. Regs. for School Year and School Day (effective September 1, 1975); Mich. Comp. Laws Ann. §340.575; Minn. Stat. Ann. §124.19; Miss. Code Ann. §37-13-63; Vern. Mo. Stat. Ann. §171.031; Mont. Rev. Code §75-7402; Neb.Rev.Stat. §79-201; Nev.Rev.Stat. §388.090; N.H. Rev.Stat. Ann. ch. 189, §1; N.J.Stat. Ann. tit. 18A, §58-16; N.Y.Educ. Law §3204(4) (McKinney); N.C.Gen. Stat. §115-36(c); N.D.Century Code §15-47-33; N.M.Stat. Ann. §§77-6-1, 77-6-9(A); Ohio Rev. Code §3313.48; Okla.Stat.Ann. tit. 70, §1-109; Ore. Dept. of Educ. Admin. Rule §22-050; Purdon's Pa.Stat. Ann. tit. 24, §15-1501; R.I.Gen. Laws §16-2-2; Defined Min. Program for S.C. School Districts: State Bd. of Educ. Governing Rules at 12, 21, 43 (1974); S.D.Comp. Laws §13-26-2; Tenn. Code Ann. §49-1709; Vern. Tex. Educ. Code Ann. §16.862; Utah Code Ann. §53-2-29; Vt. Stat.Ann. tit. 16, §1071(a); Va. Code §22-5; Wash. Rev.Code Ann. §28A.58.180; W.Va. Code §18-5-15; Wyo. Stat. §21.1-57.

Statutes in many states provide specific penalties, such as loss of state aid, for noncompliance with the minimum day requirements. See, *e.g.*, Alaska Stat. §14.07.070. West Cal. Educ. Code Ann. §17551; Fla. Sta. Ann. tit. 15, §236.02(2); Ga. Code Ann. §32-604; Kan.Rev.Stat. Ann. §70-7032; Mass. Gen. Laws Ann. ch. 71, §4A; Minn. Stat. Ann. §124.19; Mont. Rev. Code §75-7402; Ohio Rev. Code §3317.01; Utah Code Ann. §53-2-30; Vt. Stat. Ann. tit. 16, §1076; W.Va. Code §§18-9B-8, 18-9B-19; Wis. Stat. §§121.01, 121.17(1)(a).

When the Hortonville teachers' strike closed the schools, the school board's responsibility was to find a way to open them again.[6] In the belief, later confirmed by the Supreme Court of Wisconsin, that the strike constituted cause for discharge, the board scheduled and noticed hearings to determine which teachers were striking and whether the striking teachers should be discharged. At the hearing, the teachers conceded that they had engaged in a "work stoppage" and stated through counsel that they had acted uniformly. They refused to respond to the strike charges individually, maintaining that the board could not constitutionally adjudicate the issues before it "because of [its] involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration . . . ." (A. 86-87, 91.)[7] The board decided to discharge the teachers and commence recruitment of new teachers. The teachers were so notified and invited to reapply for positions. The schools reopened one week after the first day of hearings and 22 days after the beginning of the strike. *See Hortonville Education Ass'n, supra,* 66 Wis.2d at 474-477, 225 N.W.2d at 661-662, 664-665.

[6] The Wisconsin Supreme Court described the school board's predicament thus: "When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22(2), Stats., provides in part: 'No teacher may be employed or dismissed except by a majority vote of the full membership of the board.'" 66 Wis. 2d at 496-497, 225 N.W.2d at 672.

[7] "A." refers to the page of petitioners' appendix.

The Wisconsin Supreme Court held that while "[a]s much control as possible should be left with the school board to set policy and manage the school," 66 Wis.2d at 498, 225 N.W.2d at 673, the school board's involvement in the contract negotiations created a potential for bias that disqualified the board from deciding what to do about the teachers' strike. The Court said:

> "The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." 66 Wis.2d at 493-494, 225 N.W.2d at 671.

In *Withrow* v. *Larkin,* 421 U.S. 35 (1975), this Court identified, as situations "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," circumstances in which "the adjudicator has a pecuniary interest in the outcome" and those in which "he has been the target of personal abuse or criticism from the party before him." 421 U.S. at 47.

In addition to self-interest and personal animosity, this Court has held that serious and direct inconsistency in the functions an official performs may compromise his neutrality when acting in an adjudicatory role. The Court so held in *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), where the town mayor, who was the chief executive official responsible for all aspects of the town's well-being, sat as adjudicator of guilt and assessor of fines in the Mayor's Court, the revenue from which was critically important to the town's financial welfare. The mayor was thus in a direct conflict of interest position between his municipality's interest in guilty findings at the Mayor's Court and his judicial responsibility to "hold the balance nice, clear and true between the State and the accused . . . ." 409 U.S. at 60.

The Wisconsin Supreme Court did not describe the nature of the bias it believed might exist. There was no allegation of pecuniary self-interest on the part of the board members, *see Tumey* v. *Ohio,* 273 U.S. 510, 531-532 (1927), nor was there any evidence that discharging the teachers was necessary to the school district's financial well-being. *See Ward* v. *Village of Monroeville,* 409 U.S. 57, 58-60 (1972). There is no indication of personal animosity between the school board members and any teacher, nor is there proof of harsh, sustained criticism of board members by any teacher such as would presumptively call into question the board's ability to make a fair decision on the merits of that teacher's case. See, *e.g., Taylor* v. *Hayes,* 418 U.S. 488, 501, 503 (1974).[8] See also *Withrow* v. *Larkin,*

[8] There is neither allegation nor evidence that any or all of the teachers participated in collective bargaining sessions or communicated personally with board members on the subject of the contract

(footnote continued)

421 U.S. 35, 53 n. 19 (1975), explaining and limiting *dicta* in *Pickering* v. *Board of Education,* 391 U.S. 563, 578 n. 2 (1968) (appendix to opinion of the Court). The Wisconsin Court adverted to no evidence that the board had received *ex parte* information or made a pre-hearing judgment of any teacher's guilt. See *In Re Murchison,* 349 U.S. 133, 137-139 (1955). *Cf., Withrow* v. *Larkin,* 421 U.S. at 58 n. 25, explaining *Morrissey* v. *Brewer,* 408 U.S. 471, 485-486 (1972).[9]

This Court has adamantly refused to rend apart the structure of multifunctioning administrative agencies, especially on the local level, without a showing that they encompass " 'practically and seriously inconsistent positions . . . .' " *Ward* v. *Village of Monroeville, supra,* 409 U.S. at 60. The Court in *Ward* cited with approval its holding in *Dugan* v. *Ohio,* 277 U.S. 61 (1928), refusing to presume bias in a slightly different factual situation. In

(footnote continued)

dispute. There is thus no reason to believe that personal hostility, such as concerned the Court in *Taylor* v. *Hayes, supra,* was present. In this connection, *Duke* v. *North Texas State University,* 469 F.2d 829, 840 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973), is instructive. In *Duke,* the court refused to presume bias in a university hearing body's decision to discharge a teacher who had been highly critical of the university administration. "The offending statements of Mrs. Duke," the court noted, "were directed against the University administration in general, not against particular members thereof."

[9] The fact that a school board had, in an *ex parte* proceeding, examined "virtually all of the relevant evidence," weighed the evidence and reached a conclusion upon it, was held to disqualify it from adjudicating at a required adversary hearing in *King* v. *Caesar Rodney School District,* 380 F. Supp. 1112, 1119 (D. Del. 1974), *distinguished in Withrow* v. *Larkin,* 421 U.S. 35, 50-51 n. 16 (1975). No such circumstances are present in the case at bar.

Dugan, the town mayor was judge of the Mayor's Court and as in Ward, assessed fines on guilty findings; however, since the mayor was not solely and directly responsible for the town's financial prosperity, the Court held that it was not probable that his non-judicial duties would interfere with his ability to judge. 409 U.S. at 60-61. There was no direct conflict between his judicial and non-judicial responsibilities.

In *Withrow* v. *Larkin,* 421 U.S. 35 (1975), the Court reversed a district court judgment granting an injunction against the enforcement of a state administrative agency's order on bias grounds. The agency challenged was a physicans' examining board, exercising both investigative and adjudicative functions. Insisting upon a showing of a real conflict in functions and finding none, the Court held that there is nothing in such a combination of functions that ". . . necessarily creates an unconstitutional risk of bias . . . ." 421 U.S. at 47. Since there was no foundation indicating real prejudice on the board members' part, the Court presumed that the board members would act honestly and conscientiously. 421 U.S. at 55.

The Court of Appeals for the Fifth Circuit has applied similar principles in rejecting a challenge to the impartiality of a university hearing body, finding plaintiff's charges of bias "inconclusive." The court explained its holding thus:

> "We decline to establish a *per se* rule that would disqualify administrative hearing bodies such as the President's Cabinet from hearing internal university matters solely for the reason that the members are employees of the Board and because some of them participated in the initial investigation of the incident and initiation of the cause under consideration . . . . *Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous*

inferences." *Duke* v. *North Texas State University,* 469 F. 2d 829, 834 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973) (citations omitted) (emphasis added).

Even if it is assumed that ultimately futile collective bargaining negotiations culminating in a strike will generate antagonism between school board members and the union, or the teachers' representatives, or even the teachers as a group, it is not reasonable to assume that such antagonism would render a school board member incapable of accurately determining whether an individual teacher engaged in an illegal strike. It was this recognition which caused the Court of Appeals for the Sixth Circuit in *Lake Michigan College Fed'n of Teachers* v. *Lake Michigan Community College,* 518 F.2d 1091, 1099 (6th Cir. 1975) to reject a bias claim in circumstances analogous to those involved here:

> "[E]ven if the Board members were hostile toward the Union and the striking faculty, this animosity would hardly manifest itself in the form of an unfair decision against a teacher who did not participate in the strike."

In the case at bar, the school board has been vested with a combination of functions—budgeting, negotiating, adjudicating, hiring and firing—because the legislature has chosen to make the board fully responsible for the conduct of the schools. These functions are not conflicting. There is nothing about involvement in collective bargaining with teacher representatives, or being responsible for fiscal management of schools, that would reasonably tend to influence the average person's judgment on the question of whether a teacher had participated in a strike or whether a striking teacher should be discharged for such illegal activity. Assuming unconstitutional bias from this combination of functions surely, as this Court said in *Richardson* v. *Perales,* 402 U.S. 389, 410 (1971), "assumes too much . . . ."

B. A School Board's Putative Institutional Bias Against Striking Does Not Constitute Disqualifying Bias.

If the concern of the Wisconsin Supreme Court was that the school board was likely to have been opposed to striking in the school context, this kind of institutional orientation should not be deemed grounds for disqualification.[10]

Philosophical orientation toward issues involved in the cases before them has consistently been rejected as a basis for disqualifying judges and administrators. Disqualifying a school board for this kind of "bias" would require disqualifying from criminal cases all judges who are "hard on crime."

This issue has arisen in a case involving the discharge of school administrators. In *Shaw* v. *Board of Trustees,* 396 F. Supp. 872 (D. Md. 1975), terminated administrators charged that the university hearing body which had discharged them was impermissibly biased, pointing to the fact that some of its members had expressed the view that if the administrators had not met their obligation to obey school rules, they should be dismissed. The court rejected their contention, stating that the fact that board members held such a view:

> ". . . does not constitute . . . such a closed mind and prejudgment of the issues as to prevent their action on the charges in accordance with their responsibilities imposed upon them as Board members." 396 F. Supp. at 888.

A school board, like any administrative agency, will often have a policy orientation; this orientation will reflect the philosophy of the voters who elected or the official who appointed its members. The legislature, incon-

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[10] There is no evidence of such an institutional bias in this case.

trovertibly aware that a school board may have a policy orientation, expressly gave the board the powers challenged here. There is nothing in such a philosophical outlook, however, which could reasonably be expected to interfere with the board's ability, and indeed its desire, to judge the case of each teacher on its own merits. *See Lake Michigan College Fed'n. of Teachers* v. *Lake Michigan Community College,* 518 F.2d 1091, 1099 (6th Cir. 1975).

II.

ABSENT CIRCUMSTANCES NECESSITATING A PRESUMPTION OF BIAS, THE SCHOOL BOARD SHOULD NOT BE DISQUALIFIED FROM ADJUDICATING MATTERS OF HIRING, FIRING AND STAFF DISCIPLINE WITHOUT CLEAR EVIDENCE OF ACTUAL BIAS.

The determination of what process is due in any given situation "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Local 473* v. *McElroy,* 367 U.S. 886, 895 (1961). As in the consideration of the kind of notice and hearing which must be provided, the determination of how isolated from the issues and parties the decisionmaker must be to be presumptively fair depends on a balancing of interests. *Compare Duncan* v. *Louisiana,* 391 U.S. 145, 149, 151-152 (1968) *with FTC* v. *Cement Institute,* 333 U.S. 683, 701-702 (1948). Amicus respectfully submits that for the preservation of vital, interested school boards with the capacity to govern internal school affairs responsibly, this Court should require clear evidence of actual bias before it divests school boards of their decisionmaking power with respect to matters of staff discipline.

In the context of administrative regulation, the law places independent value on the administrative adjudicator's experience and expertise, his philosophical commitment to the goals of the legislation he is charged with executing and his interest in effective regulation. Distance from and disinterest in the subject he is adjudicating is neither required nor desired. *See FTC* v. *Cement Institute,* 333 U.S. 683, 701-702 (1948). *See generally* 2 K.C. Davis, *Administrative Law Treatise* § 12.01, pp. 134-138 (1958).

In the context of government employment, those in supervisory roles are relied on to ensure the efficient and competent provision of government services. In the context of public school administration, the community depends on school boards to provide its children with an education that will equip them to meet the challenge of a complex society. The recruitment and maintenance of a competent, effective and dedicated teaching staff is critical to the fulfillment of this function and is one of the school board's most important responsibilities. *See, e.g., Cato* v. *Collins,* 394 F.Supp. 629, 640 (E.D. Ark. 1975).

For government employers in general and school board members in particular, interest and involvement in the performance of their employees is critically important. Discharge decisions *should* be made by those familiar with the individual employee and knowledgeable about his work. And absent a situation in which special discharge procedures have been established, it cannot be at odds with an employee's expectation that such a decision will be made by his employer.[11] See *Arnett* v. *Kennedy,* 416 U.S. 134, 155 (1974); *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

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[11] With exclusive authority to discharge vested in the Hortonville School Board, *see* Wis. Stat. § 118.22(2) (1973), the Hortonville teachers could have had no other expectation.

Lower courts have acted in recognition of the values implicit in maintaining the traditional employer-employee relationship in the public sector except where due process clearly requires its abrogation. Thus, in *Robison* v. *Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245 (5th Cir. 1975), where an anti-poverty agency employee challenged his discharge on the basis of the alleged bias of the officials who terminated him, the Court of Appeals for the Fifth Circuit rejected a history of antagonism between the parties as a basis for disqualification:

> "Wichita is a small organization and, not unlike other organizations, is subject to personality clashes, disagreements over policy, and factions among the directors and staff. . . . . Corporate officials designated to serve as judges or arbitrators know the parties whose interests are at stake and are bound to form some judgment regarding their character and competence as well as the needs and policies of the organization. Just as a determination of bias does not follow from the fact that a hearing examiner or trial judge may entertain an unfavorable opinion of a party as a result of evidence received in a prior or connected hearing, a determination of bias will not follow from the mere fact that an arbitrator or deciding authority has prior and independent knowledge of the dispute. . . . Absent some showing of *actual* interest or partiality, we must find no denial of due process. If the courts were to find otherwise, no small public agency would be able to settle its own disputes." 507 F.2d at 253 (emphasis by the court).

In *Couper* v. *Madison Board of Police and Fire Comm'rs*, 369 F.Supp. 721 (W.D. Wis. 1974), the court refused a police chief's request for a temporary restraining order against police board hearings on bias grounds. Although

the court's decision was influenced by its unwillingness to enjoin state administrative processes without an "extremely strong" showing of bias, the court reviewed the plaintiff's bias allegations in light of the board's statutory power to remove the chief and in view of their necessary "continuing working relationship." While the court's language is addressed to the question of the propriety of injunctive relief, the concerns it expresses are relevant here:

> "[*Gibson* v. *Berryhill*, 411 U.S. 564 (1973)] leaves me free to apply what I consider to be a proper constitutional standard, namely, that the showing of the existence of bias in the decision-making entity, such as the Board of Police and Fire Commissioners, must be extremely strong before the board is to be enjoined even from conducting hearings on charges which fall within its exclusive jurisdiction. To adopt any less stringent test would be to introduce unnecessary and undesirable impediments to the supervision of a president of a public university by its governing board, to the supervision of a superintendent of a public school system by the board of education, to the supervision of the medical staff of a public hospital by the executive committee of the medical staff or by the board of directors of the hospital, and to the supervision of other public officials by the boards and committees charged by law with the responsibility for such supervision." 369 F.Supp. at 727 (footnotes omitted).

That the existence of an employer-employee relationship influences the nature of the process that is due was recognized in the plurality opinion of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Kennedy, a discharged civil service employee, had contended that his supervisor, who discharged him, was insufficiently impartial to make the discharge decision because of accusations Kennedy had

made against him. Mr. Justice Rehnquist, for the plurality, noted:

> "Employer-employee disputes of this sort can scarcely avoid involving clashes of personalities, and while a charge that an employee has defamed a supervisor [the charge against Kennedy] may generate a maximum of personal involvement on the part of the latter, a statement of more typical charges will necessarily engender some degree of personal involvement on the part of the supervisor." 416 U.S. at 155-156 n. 21 (dictum).

Mr. Justice Powell, concurring with Mr. Justice Blackmun, stated:

> "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." 416 U.S. at 168.

It is not only the value of responsible and effective management but our national commitment to placing on the community's representatives the responsibility for the conduct of the public schools that argues against the Wisconsin Court's abrogation of school boards' authority in matters of staff conduct. This Court in the past has been sensitive to this important national commitment. *See, e.g., Wood* v. *Strickland,* 420 U.S. 308, 326 (1975).

A number of courts have expressly refused to withdraw decisionmaking power from school governing bodies without evidence of actual bias. In *Duke* v. *North Texas State University,* 469 F.2d 829 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973), the Court of Appeals for the Fifth Circuit held that a showing of actual bias was necessary to justify disqualification of a university hearing body, even on a record of strong public criticism of the university administration by the discharged teacher:

> ". . . [W]e decline to establish a rule that would *per se* disqualify the President's Cabinet composed of the President and two Vice Presidents of the University, from conducting a hearing pertaining to the dismissal of one of its employees, a part-time teacher, merely because the teacher involved has made a broadside attack on the administration of the University, though in terms which are to say the least, vulgar and profane. This is especially true when the record fails to disclose actual bias or prejudice against Mrs. Duke on the part of any member of the President's Cabinet, and likewise of any member of the Board of Regents." 469 F.2d at 840.

In *Simard* v. *Board of Education,* 473 F.2d 988 (2d Cir. 1973), a high school teacher, discharged for insubordination and " 'other due and sufficient cause,' " contended that he had been adjudicated guilty by a biased school board, bent on discharging him for his activities in the Groton Educational Association; these activities included his role as chief union negotiator in a series of bitter contract negotiations. Simard's bias allegations focused, as do those in the case at bar, on the school board's involvement in collective bargaining negotiations. The court rejected his claim that the board should be disqualified because its members' impartiality may have been compromised in bargaining table confrontations. The court explained:

> "School boards frequently negotiate with teachers in their capacity as bargaining representatives. The con-

stitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias." 473 F.2d at 993 (footnotes omitted).[12]

In *Kaprelian* v. *Texas Woman's University,* 509 F.2d 133 (5th Cir. 1975), the trial court, like the Wisconsin Supreme Court here, responded to charges of bias by ordering the plaintiff teacher and the school administration to take their discharge dispute to a wholly uninvolved tribunal. The Court of Appeals reversed, stating:

"Having made no finding, as scarcely it could, that the university hearing committee lacked apparent impartiality, the court nevertheless substituted another, to be selected according to procedures of its own devising, and referred all questions to it. Such a measure wants precedent in authority and is at variance with that respect for the academic administrative process and insistence that it be permitted to run its course which are indicated in our . . . opinions. The court's directions apply a *per se* rule of disqualification on suspicion to rend from the structure of authority the very functions which it is created to and must perform if institutional order is to obtain. This was error." 509 F.2d at 138 (footnotes omitted).

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[12] The *Simard* case, involving the discharge of one well-known and uncommonly active union leader on vague and imprecise charges, raises questions of possible personal animosity, discrimination and motive not present in the case at bar.

Amicus respectfully submits that these authorities strike the appropriate balance between the interests of teachers in having a fair opportunity to respond to charges and the interest of the educational institution, and the public, in preserving staff discipline and regulating its own affairs. The authority of local school boards can be preserved and the due process interests of their teaching staffs well protected by requiring clear evidence of actual, debilitating interest or prejudice before a school board is shorn of powers lawfully entrusted to it.

III.

THE PROCEEDINGS BEFORE THE SCHOOL BOARD DEMONSTRATED THAT THE BOARD WAS NOT BIASED.

In holding that the school board's involvement "in the events which precipitated decisions [it was] required to make" constitutionally disqualified it from making those decisions, the Supreme Court of Wisconsin found no evidence of actual bias. The Court expressly noted that it did not find actual unfairness on the part of the board:

"[Our holding] is not to suggest . . . that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." 66 Wis. 2d at 494, 225 N.W. 2d at 671.

The conduct of the board, in manifestly exigent circumstances, demonstrated fairness, deliberateness and a desire to bring the teachers back to school. Two days after the commencement of the strike, the absent teachers were urged by the superintendent of schools to return to work; several teachers returned. A few days later, the superintendent wrote to all teachers still absent, advising them

that the strike was in violation of law and would not be condoned. It was not until twelve days after the beginning of the strike, when the teachers had still not returned to their classrooms, that the school board voted to hold disciplinary hearings. It notified the teachers that they were charged with striking and advised them that the board was considering the termination of teachers found to be on strike.[13] *See Hortonville Education Ass'n, supra,* 66 Wis. 2d at 474-475, 225 N.W. 2d at 661.

The teachers appeared *en masse* with counsel and indicated that they would not answer questions or make statements individually. They sought to introduce evidence of the board's bargaining conduct through cross-examination of school board members; the board deemed this evidence irrelevant, and the teachers made an offer of proof.[14] 66 Wis. 2d at 475, 225 N.W. 2d at 661-662.

The strike continued after the hearing (A. 123), and the board voted to discharge the teachers and begin recruitment of a new teaching staff. The teachers were notified of the board's decision and invited to reapply for positions. The one teacher who did so was rehired. 66 Wis. 2d at 476-477, 225 N.W. 2d at 662.

This record is sparse, but it shows clearly that the Hortonville School Board acted to one end: to reopen the

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[13] The trial court found, and the Supreme Court did not indicate its disagreement, that there is no defense of justification to a charge of illegal striking by public employees in Wisconsin. (A. 123-125, 195-196.)

[14] The teachers alleged lack of timely notice in the trial court, but the court found the notice adequate. (A. 194-196.) The Supreme Court found that the teachers had been given an opportunity to request additional time and had failed to do so. 66 Wis. 2d at 491 n. 7, 225 N.W. 2d at 670 n. 7.

schools. Absolutely no indication of anti-teacher bias appears. The board at no time made any decision or took any action without authority of state law.

This Court has recognized that a decisionmaker's conduct may refute a charge of bias. *See Ungar* v. *Sarafite,* 376 U.S. 575, 585-588 (1964). The conduct of the school board does so here.

CONCLUSION

The courts have never been closed to claims that substantive constitutional rights have been infringed in the context of teacher discharge decisions. *See, e.g., Perry* v. *Sindermann,* 408 U.S. 593, 596-598 (1972); *Connell* v. *Higginbotham,* 403 U.S. 207, 208-209 (1971). Nor has this Court been unable to spot the potential for debilitating personal interest when it exists. *See Gibson* v. *Berryhill,* 411 U.S. 564, 578-579 (1973). But the continued strength of local democratic institutions, and the survival of responsible citizen control of public schools, depends on the willingness of the judiciary, absent evidence to the contrary, to trust state school administrators " 'to be men of conscience and intellectual discipline' " and to rely on them to fulfill conscientiously the responsibilities entrusted to them. *See Withrow* v. *Larkin,* 421 U.S. at 55. It is this trust that has led this Court to find that interested and involved state administrators, following the procedures required by due process, can fairly make decisions affecting significant interests. *See Goss* v. *Lopez,* 419 U.S. 565, 580-582 (1975); *Wolff* v. *McDonnell,* 418 U.S. 539, 564-565, 570-571 (1974).

The Hortonville school board, faced with an illegal strike, had to determine how to fulfill expeditiously its most important responsibility: to provide adequately

functioning schools for the community's schoolchildren. There is nothing in this record to suggest that the board was unwilling to listen to the teachers' response to the strike charges or incapable of making a reasoned judgment on the facts presented to it; indeed, the board had entreated the teachers to return to school. If "a realistic appraisal of psychological tendencies and human weakness"[15] compels a presumption of bias in the circumstances of this case, then there is little hope for the survival of responsible institutions of self-government.

The National School Boards Association therefore respectfully urges this Court to reverse the decision of the Supreme Court of Wisconsin holding the Hortonville School Board constitutionally disqualified by bias from deciding whether or not to discharge its teachers for engaging in an illegal strike.

Respectfully submitted,

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[15] See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).